

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ANGELICA PAZ, )  
)  
                    Claimant, )  
)  
                    v. )  
)  
CROOKHAM COMPANY, )  
)  
                    Employer, )  
)  
                    and )  
)  
LIBERTY NORTHWEST )  
INSURANCE CORPORATION, )  
)  
                    Surety, )  
)  
                    Defendants. )  
\_\_\_\_\_ )

**IC 96-032054**

**FINDINGS OF FACT,  
CONCLUSION OF LAW,  
AND RECOMMENDATION**

Filed  
March 31, 2005

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Boise on October 28, 2004. Claimant, Angelica Paz, was present in person and represented by Michael G. Brady of Boise; Defendant Employer, Crookham Company, and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Monte R. Whittier of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of a post-hearing deposition, the submission of briefs, and subsequently came under advisement on January 19, 2005.

## **ISSUE**

The sole remaining noticed issue to be resolved is:

1. Whether Claimant is entitled to permanent partial disability (PPD) in excess of permanent impairment, and the extent thereof.

At hearing, the noticed issues of whether Claimant was entitled to permanent partial impairment (PPI) benefits, and whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 was appropriate were withdrawn by the parties. (Transcript, pp. 5-6).

## **ARGUMENTS OF THE PARTIES**

Claimant argues her capacity for gainful activity has been reduced as a consequence of her industrial injury, and that she is entitled to a PPD rating of at least 40% in addition to her PPI rating of 10.5%. She cites the six surgeries to her left wrist following her industrial accident, and the permanent lifting restriction of 20 pounds for her left upper extremity. In addition, she cites her lack of education, age, social and economic background, lack of transferable skills, and limited employment history as contributing non-medical factors to her disability rating. Because of these medical and nonmedical factors, Claimant maintains she is ill-equipped to compete in an open labor market. Claimant further argues her continued employment with Employer is not a factor in determining her disability; instead the focus should be on the reduction in her capacity for gainful activity. She maintains she can now only compete for menial entry-level jobs. Claimant also argues her current earnings are a reflection of her longevity and Employer approval, not of her ability to engage in gainful activity.

Defendants counter Claimant's disability analysis has focused strictly on the theoretical loss of potential jobs based solely on the 20 pound lifting restriction to her non-dominant hand, even

## **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION - 2**

though she has continued to work for Employer since her August 1996 industrial accident and received annual cost-of-living increases. They maintain, that even if Claimant were to leave Employer today, her wage loss would only be 23.5%. Defendants further argue that in their more reasoned analysis, Claimant's true loss of labor market access is 22% inclusive of her 10.5% PPI. They also argue, that since Claimant has not shown any decrease in wage earnings at this time, she has failed to establish she is entitled to any PPD benefits. In the alternative, in the event the Commission feels Claimant is entitled to PPD benefits, Defendants argue the proper measure is the 22% they have calculated.

In rebuttal, Claimant argues her current employment is not a factor in determining her PPD, and that the notion an individual who continues to be employed by the same employer does not incur a PPD is nonsense. She maintains the real issue here is whether she can compete in an open labor market given her PPI rating, permanent lifting restriction, and her relevant non-medical factors including the fact she is a middle-aged, functionally illiterate Hispanic female. Claimant asks the Commission to award her a PPD rating of 40% over her PPI.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and John Janzen, Ph.D., taken at the October 28, 2004, hearing in this matter;
  2. Claimant's Exhibits 1 through 9 admitted at the hearing;
  3. Defendants' Exhibits A through G admitted at the hearing;
  4. The deposition of Mary Barros-Bailey taken by Defendants on November 16, 2004;
- and,

5. The AMA *Guides to the Evaluation of Permanent Impairment*, Fifth Edition (AMA *Guides*), of which the Referee takes notice.

Defendants' objection on p. 27 of Ms. Barros-Bailey's deposition is sustained; their objections on pp. 36-37 and 45 are overruled.

After having fully considered all of the above evidence, and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant was born and raised in Caldwell. She began working seasonally for Employer as a laborer when she was 14 years old pollinating corn, and in the fields weeding. Both her parents worked for Employer; she initially obtained employment through her Mother. One of her siblings also works for Employer. Claimant left high school while in the tenth grade at the age of 17. She does not have a GED and has received no other formal education since leaving school. At the time of the hearing, Claimant was 42 years old.

2. Claimant began working full-time for Employer in 1993 in the germination room as a seed analyst performing tests to determine seed moisture, germination, vigor, and purity. In addition to performing the tests, she would plant the seeds, perform basic mathematical calculations, file samples and test results, and enter the data into a computer. Claimant also supervised 10 to 12 field workers cross-pollinating corn in Employer's research nursery during the growing season, providing some instruction and insuring that the workers were properly performing their duties. She did minimal manual labor as a supervisor.

3. On August 21, 1996, Claimant injured her left wrist while attempting to break the shank off an ear of corn she had just husked. At the time she was being paid \$10.63 per hour.

Claimant is right hand dominant.

4. Claimant's wrist injury was initially diagnosed as a sprain. An extended period of conservative care followed including nonsteroidal inflammatory medications, physical therapy, steroid injections, and a wrist brace. Her condition did not improve. An arthrogram showed a torn triangular fibril cartilage. Claimant underwent an arthroscopic debridement of the torn cartilage in 1998; an ulnar shortening osteotomy in 1999; a procedure in 2000 to remove the hardware associated with the 1999 procedure; a reconstruction of the left distal radioulnar joint in 2001; the removal of exterior tendon adhesions in 2002 which had developed after the earlier surgeries; and a revision stabilization of her ulnar remnant in 2003. All of the procedures were performed on an outpatient basis.

5. Claimant continued to work for Employer in the germination room during this time period. She returned to work with no restrictions after each of the first five surgical procedures.

6. On March 29, 2004, Steven B. Care, M.D., Claimant's treating physician, opined she was medically stable, and assigned her a PPI rating of 18% of the upper extremity (UE) and a permanent lifting restriction of 20 pounds for her upper left extremity. The rating was taken from the *AMA Guides*. Under Table 16-3 of the *Guides*, this UE rating equates to 11% of the whole person, not the 10.5% used by the parties.

7. In 2002, John M. Janzen, Ph.D., prepared a rehabilitation evaluation of Claimant at the request of her attorney. He revised his evaluation in an addendum dated May 10, 2004, after receiving Dr. Care's impairment rating and permanent 20 pound lifting restriction. Dr. Janzen, a vocational rehabilitation consultant, opined Claimant was limited to occupations with a light job classification, and that with this restriction she was precluded from meeting the physical demands of

approximately 40% of the jobs in the national labor market. He further opined, that with her physical restriction, her tenth grade education, her lack of a GED, and the absence of transferable skills from non-material handling tasks, Claimant's vocational disability stood at 40%. Dr. Janzen's rating was in addition to Claimant's impairment rating.

8. In September 2004 Claimant applied for and accepted a job with Employer as a shipping secretary in shipping and receiving. The job vacancy was created by the departure of another employee. It involves paperwork, computer data entry, ten key, and filing. Claimant also continues to work seasonally as a field supervisor in Employer's research nursery. The shipping job is within Claimant's 20 pound work restriction; there was no accommodation. The shipping job also allows Claimant the opportunity to train in various office procedures and could lead to an increase in her hourly wage. These opportunities were not available to her in the germination room.

9. Claimant is bilingual. She assists Employer by helping seasonal Spanish speaking applicants fill out their employment applications, and acting as interpreter for them as they interface with Employer's office staff.

10. At Defendants' request, Mary Barros-Bailey prepared a disability evaluation for Claimant. Her report is dated October 11, 2004. Ms. Barros-Bailey, a vocational rehabilitation consultant, opined that if Claimant did not continue to work for Employer, she would sustain some loss of job access involving the limitation to her non-dominant left hand to light work, although, bilaterally, she could exert beyond a light level of force since there is no limitation to her dominant right hand. She further opined Claimant's transferable skills would allow her to access laboratory aide, technician, clerk, analyst, inspector and tester positions given her prolonged work experience. Nevertheless, Ms. Barros-Bailey opined, Claimant would still sustain a loss of access to the Boise

metropolitan area labor market equivalent to 22%. Her disability rating was inclusive of Claimant's impairment rating.

11. At her pre-hearing deposition, Diane Crookham, Employer's personal manager, stated Claimant was a valuable employee, that her job was not in jeopardy, and that she was unaware of any problems Claimant might have reading and understanding English.

12. At the time of the hearing, Claimant was being paid \$13.08 per hour. The increase in her pay from the date of injury was due to yearly cost-of-living raises.

13. At hearing, Dr. Janzen opined Claimant was functionally illiterate in reading comprehension and mathematical skills; that her jobs with Employer were routine, repetitive, and unskilled with few transferable skills, and that she had not acquired the skills attributed to her by Ms. Barros-Bailey since they were not required in performing her jobs. He further opined there were few jobs available to someone who could only use one hand instead of two, and that Claimant does not have the educational or work experience to perform the jobs recommended by Ms. Barros-Bailey. Dr. Janzen opined Claimant had incurred a disability rating of 40% of the whole person above her impairment rating based on the limitations to her left wrist and hand, the percentage of jobs available nationally above a light work classification, the difference between her salary with Employer and what she would earn in an unskilled position, and her lack of transferable skills. He further opined Claimant could find entry-level work in the fast food industry, as a courier, or as an order filler earning \$6.00 to \$7.00 per hour. Mr. Janzen did note Claimant was very articulate.

14. At her post-hearing deposition, Ms. Barros-Bailey opined Claimant's positions with Employer would be classified as semi-skilled, and that she possessed some transferable skills. She further opined, that if Claimant was actively seeking work, and considering her transferable skills

and lifting restriction, she would incur a disability rating of 22% based on her loss of job access. The rating was inclusive of her permanent impairment. Ms. Barros-Bailey also opined Claimant would not suffer a wage loss if she acquired work as a laboratory analyst paying between \$12.77 and \$17.31 per hour. She acknowledged assuming Claimant was literate in making her disability determination.

15. Claimant continues to have problems bending her wrist up and down, and with wrist pain. Her pain increases with activity. She is able, however, to fulfill the functions of her current position. Claimant does not feel her job is in jeopardy.

### **DISCUSSION**

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Permanent Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding

employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that permanent partial or total loss or loss of use of a member or organ of the body no additional benefits shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

At the time of the hearing, Claimant was working full-time for Employer in a position within the permanent lifting restriction imposed on her by Dr. Care, and at an hourly wage greater than what she was earning at the time of her August 1996 industrial accident. She is asking the Commission to disregard her current employment, and base its disability evaluation on the effect her permanent impairment, the lifting restriction to her non-dominant upper left extremity, and her pertinent nonmedical factors would have on her ability to engage in gainful activity in an open labor market.

Under the statutory scheme, a disability evaluation looks at the effect permanent impairment and pertinent non-medical factors have on a claimant's "actual or presumed ability" and "present

and probable future ability” to engage in gainful activity. It is clear Claimant’s actual and present ability to engage in gainful activity has not been affected by her permanent impairment and pertinent nonmedical factors. She continues to work for Employer in a higher paying position with the opportunity for further pay increases. There is nothing in the record to indicate her employment will end. Therefore, it must be presumed Claimant’s probable future ability to engage in gainful activity will not be reduced as long as she continues to work for Employer. There is no evidence to the contrary.

Under these circumstances, the Referee finds Claimant has not carried her burden in demonstrating that she is entitled to permanent disability. She has not shown that her capacity for gainful employment has been reduced. Her current employment cannot be ignored. Thus, the Referee concludes Claimant is entitled to a permanent total disability of 11% of the whole person inclusive of her permanent impairment. There is no disability above impairment.

#### **CONCLUSION OF LAW**

1. Claimant is entitled to a permanent partial disability (PPD) rating of 11% of the whole person inclusive of her permanent partial impairment (PPI) rating. There is no disability above impairment.

#### **RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends the Commission adopt such findings and conclusion as its own, and issue an appropriate final order.

DATED In Boise, Idaho, this 17th day of March, 2005.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
Robert D. Barclay  
Chief Referee

ATTEST:

/s/ \_\_\_\_\_  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2005, a true and correct copy of **Findings of Fact, Conclusion of Law, and Recommendation** was served by regular United States Mail upon each of the following:

MICHAEL G BRADY  
BRADY LAW CHRTRD  
PO BOX 1398  
BOISE ID 83701-1398

MONTE R WHITTIER  
LAW OFFICES OF HARMON WHITTIER & DAY  
PO BOX 6358  
BOISE ID 83707-6358

kk

/s/ \_\_\_\_\_

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ANGELICA PAZ,	)	
	)	
Claimant,	)	<b>IC 96-032054</b>
	)	
v.	)	<b>ORDER</b>
	)	
CROOKHAM COMPANY,	)	Filed
	)	March 31, 2005
Employer,	)	
	)	
and	)	
	)	
LIBERTY NORTHWEST	)	
INSURANCE CORPORATION,	)	
	)	
Surety,	)	
	)	
Defendants.	)	
_____	)	

Pursuant to Idaho Code § 72-717, Referee Robert D. Barclay submitted the record in the above-entitled matter, together with his findings of fact and conclusion of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with the recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant is entitled to a permanent total disability (PPD) rating of 11% of the whole

person inclusive of her permanent partial impairment (PPI) rating. There is no disability above impairment.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to the issues adjudicated.

DATED This 31st day of March, 2005.

INDUSTRIAL COMMISSION

/s/  
Thomas E. Limbaugh, Chairman

/s/  
James F. Kile, Commissioner

/s/  
R. D. Maynard, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 31st day of March, 2005, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following:

**ORDER - 2**

MICHAEL G BRADY  
BRADY LAW CHRTRD  
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/s/ \_\_\_\_\_